

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 517 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

KASAMBHAI ISMAILBHAI THRO' HEIRS AND L.R.

Versus

BAVABHAI KARSANBHAI PATEL

Appearance:

MR SURESH M SHAH for Petitioners

MR JR PANDYA for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/06/98

J U D G E M E N T

1. This Revision Application under Section 29(2) of the Bombay Rent Act, 1947 (for short "the Act") has been filed by the tenant challenging the decree for eviction and the rent, etc. passed by the trial Court which has been confirmed in Appeal by the lower Appellate Court. None has appeared on behalf of the landlord respondent at the time of hearing of this Revision. As such the Counsel for the revisionist Shri M.S.Shah has been heard.

2. The Suit for eviction of the revisionist was filed mainly on ground of tenant being in arrears of rent for more than six months as contemplated under Section

12(3)(a) of the Act. Notice was served by registered Post upon the revisionist. He did not pay the arrears of rent nor he deposited the same in Court. He did not file any written statement nor did he raise any dispute regarding the standard rent. The defence of the tenant revisionist was struck off by a specific order of the trial Court within the ambit of Section 11(4) of the Act. Plaintiff's evidence was recorded and ultimately the Suit was decreed. In Appeal the Decree of the trial Court was confirmed.

3. Four submissions have been raised by the learned Counsel for the revisionist in this revision.

4. First argument has been that the notice of demand and ejectment was not duly served on the tenant. This point need not detain me long because notice was sent at the correct address by the revisionist by Registered Post A.D. and the A.D. was returned bearing signature of the tenant revisionist. Evidence was assessed and finding of fact was recorded that the notice was personally served on the revisionist. This finding of fact was confirmed by the appellate Court. Consequently on this concurrent finding of fact revisional interference by the High Court will be totally uncalled for. This argument has, therefore, no substance that the notice was not properly served.

5. The next contention has been that after the defence was struck off the tenant revisionist had right to participate in the proceeding and opportunity for cross examination should have been given to the tenant revisionist. It is true that defence of the revisionist was struck off by the trial Court within the scope of Section 11(4) of the Act. However, striking of defence did not prevent the tenant revisionist from cross examining the plaintiff or witnesses examined by him. He could not be prevented from participating in proceeding. Of course since he did not file his written statement he could not be asked or permitted to file written statement, but his right to cross examine the plaintiff and his witnesses could not be taken away. However, this right could not be exercised in vacum. Somebody should have made request either orally or in writing before the trial aCourt that defendant wants to cross examine the plaintiff and his witnesses and to participate in further proceeding. Since no such request was made no illegality was committed by the trial Court in recording the statement on the date the defence was struck off and posting the case for pronouncement of judgment. This procedure cannot be said to be illegal nor it has caused

any prejudice to the revisionist. Consequently on this ground also the judgment and Decree of the trial Court cannot be disturbed nor of the appellate Court.

6. Next contention has been that the Suit was filed under Section 13(3)(a) of the Act on ground of non-payment of rent for more than six months and that to within a month of service of notice of demand. My attention was drawn to the averments made in the plaint in this behalf. Issues were also referred to me. Since the defence was struck off and there was no written statement the trial Court made futile exercise of framing the issues. Issues are framed only on points which are specifically averred in the plaint and specifically denied in the written statement. Be that it may, issues were not required to be framed. However, relevant issue on the point framed by the trial Court does not show that it was an issue under Section 12(3)(a) of the Act. However, even if it is accepted that the trial Court granted Decree under Section 12(3)(a) of the Act it has to be seen whether decree could be granted under this section or not. Learned Counsel for the revisionist contended that even according to the plaint it was a case of the plaintiff that besides standard rent the tenant was to pay taxes and electricity charges as part of the rent and if this is so then taxes are payable annually and not monthly. The consequence of it is that the rent will not be deemed to be payable monthly and as such the tenant did not commit default within the scope of Section 13(3)(a) of the Act. This contention, according to the learned Counsel for the revisionist, was pressed in the lower Appellate Court, but no answer has been given to this plea by the lower Appellate Court. After carefully examining the Judgment of the lower Appellate Court I find that no specific answer has been given by the lower Appellate Court whether Section 13(3)(a) applies on the facts of the case or not. It was the duty of the lower Appellate Court to answer this point specifically. Consequently contention of the learned Counsel for the revisionist has to be accepted to this extent that the lower Appellate Court has not answered this plea whether Section 13(3)(a) is applicable on the facts of the case or not.

7. Last contention has been that if the lower Appellate Court finds that Section 13(3)(a) is applicable the decree of the trial Court can certainly be confirmed, but if the finding of the lower Appellate Court is that Section 13(3)(a) does not apply it should have dismissed the Suit and it could not have decreed the same taking shelter behind Section 13(3)(b) of the Act. In support

of his contention he has relied upon the verdict of the Apex Court in N.M.Engineer V/s. Narendra Singh, reported in A.I.R. 1995 SC 448 and two unreported decisions of this Court. When Supreme Court's verdict has been cited there is no necessity to burden this judgment by citing decision of Single Judge of this Court.

8. The Apex Court in N.M.Engineer's case (Supra) has laid down in Para : 12 that the appellant having failed in his case under Section 12(3)(a) can not seek to rely on Section 12(3)(b) of the Act. It further laid down that Section 12(3)(b) is entirely different.

9. The Judgment of the Appellate Court shows that without giving specific findings or opinion whether the case is covered by Section 12(3)(a) or not abruptly proceeded to examine whether under Section 12(DD) Decree for eviction can be maintained and on this footing the Appeal was dismissed and Decree of the trial Court was confirmed. In view of the verdict of the Apex Court cited above this approach was totally erroneous. This contention of the learned Counsel for the revisionist has therefore to be accepted.

10. To sum up, therefore, it can be said that the lower Appellate Court has not properly appreciated the arguments advanced on behalf of the tenant - revisionist before it. However, this Court is not inclined to dismiss the Suit of the landlord. The only proper course is to allow the revision, set aside the Judgment and Decree of the Lower Appellate Court and remand the Appeal to the lower Appellate Court for fresh decision, firstly on the point whether the case of the landlord is covered under Section 12(3)(a) of the Act or not. If it comes to the conclusion that Section 12(3)(a) is applicable on the facts of the case it may proceed accordingly. If, however, it comes to the conclusion that Section 12(3)(a) is not applicable then he shall consider whether alternative case though not pleaded in the plaint that the case is covered under Section 12(3)(b) of the Act could be considered and the Decree for eviction could be confirmed.

11. In the result the Revision is allowed. The Judgment and Decree of the Lower Appellate Court is set aside. The Appeal is remanded to the lower Appellate Court for fresh decision on the point in line of the observation made hereinabove. Revisionist shall bear his own cost of this revision. Rule made absolute accordingly only in aforesaid terms.

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